IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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CASES CITED

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

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BRIEF OF APPELLANT

This is an appeal by the plaintiff, Columbia Broadcasting System, Inc., from a final decree of the District Court of the United States for the Southern District of New York dismissing the complaint for want of jurisdiction over the subject matter of the suit.

The suit is one to set aside, annul and permanently enjoin the enforcement of an order of the Federal Communications Commission promulgating regulations applicable to radio stations engaged in chain or network broadcasting on the grounds, among others, that it is beyond the statutory authority of the Commission, and that, if the statute were construed to confer such authority, it would be unconstitutional. It was instituted against the United States under Section 402(a) of the Communications Act

of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Sec. 402(a)), which made applicable the provisions of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Secs. 41(28), 43-48, inclusive) with respect to suits to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission. The Federal Communications Commission and Mutual Broadcasting System, Inc. intervened as defendants.

Appellant moved for a preliminary injunction and the United States and the Federal Communications Commission moved to dismiss the complaint or for summary judgment. A statutory three-judge court, convened under the Urgent Deficiencies Act, granted the motion to dismiss and refused to act upon the motion for preliminary injunction.

OPINIONS BELOW

The majority opinion (Learned Hand, *C.J.*, and Goddard, *D.J.*, R. 456) and the dissenting opinion (Bright, *D.J.*, R. 466) are not yet reported.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions for direct appeal in the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Secs. 47, 47a), made applicable by Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Sec. 402(a)). The decree appealed from (R. 470) was entered February 21, 1942 (R. 471). The application for this appeal (R. 471) was made February 27, 1942, and appeal was allowed (R. 483) on March 2, 1942.

This Court noted probable jurisdiction on March 16, 1942.

QUESTION PRESENTED

Whether appellant is entitled to review an order of the Federal Communications Commission, promulgating regulations which affect its contractual relations with broadcasting stations and thereby impair its ability to carry on its business, in a suit under the provisions of Section 402(a) of the Communications Act of 1934; or is confined to intervention before the Commission upon applications by such stations for renewal of their licenses, and appeal under Section 402(b) of the Act from the Commission's action thereon.

STATUTE INVOLVED

The statute involved is Section 402 of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Sec. 402) which is printed in full in the appendix.

STATEMENT

Appellant (hereafter sometimes referred to as "Columbia") is, and for many years has been, engaged in the business of operating a nation-wide network radio broadcasting system. This operation consists essentially of the furnishing of radio programs for simultaneous broadcasting thereof by broadcasting stations to which the programs are transmitted by wire from a central point of origination (Complaint, Pars. Third and Fourth, R. 2, 3).

This business, which is substantial (Complaint, Par. Third, R. 2), is based principally upon contracts, called "affiliation contracts", between Columbia and various broadcasting stations located in cities throughout the coun-

try. Columbia supplies network programs to 123 stations in 122 cities, so distributed that the programs can be heard by over 90% of the listening audience of the nation. Only eight of these stations are operated by Columbia itself; of these eight, seven are owned by Columbia and one leased by it. The remaining 115 stations are all independently owned and operated, and Columbia's relationship with them depends solely upon the terms of the affiliation contracts. These stations are known as "affiliated" stations or "affiliates" (Complaint, Pars. Third and Fourth, R. 2, 3).

The Commission's order, to set aside which this suit was brought, is directed primarily at network operations as carried on through such affiliation contracts. It aims to outlaw the very provisions which are most significant and essential to the relationship between Columbia and its affiliates. It does this by providing, in a series of regulations promulgated by the order, that "No license shall be granted to a standard broadcast station" having any contract with a network organization which contains the proscribed provisions. No broadcasting station can operate at all except by virtue of a license from the Commission. Hence, to remain on the air, the affiliated stations must get rid of their contracts with Columbia, or the forbidden provisions thereof, at the latest before their existing licenses expire and they apply for renewal thereof (Complaint, Pars. Fourth, Fifth, Sixth, Seventh and Ninth, R. 3-7, 9-10). The Commission's order, therefore, while ostensibly directed at the conduct of the affiliated stations, in reality strikes at the foundation of Columbia's business as a network.

The complaint as amended (R. 1-12, 47-48) sets forth a brief statement of the facts constituting Columbia's cause of action. It alleges the general nature of Columbia's opera-

tions as a network organization and the substantial character of the business which it has developed (Pars. Third and Fourth); the material terms of the principal provisions of the affiliation contracts and their importance to Columbia's operations (Pars. Fifth and Sixth); the terms of the Commission's order, in so far as it affects Columbia (Par. Seventh); the history of the proceedings before the Commission (Par. Eighth); the effect of the order upon Columbia's business (Pars. Ninth and Tenth); the grounds of Columbia's assertion of the invalidity of the order (Pars. Eleventh, Twelfth and Thirteenth); and the irreparable injury that Columbia will suffer unless its enforcement be enjoined (Par. Fourteenth).

To the complaint as amended are attached several exhibits. Exhibit A (R. 12-17) is the typical form of Columbia's affiliation contracts. Exhibit B (R. 17-20, 49-219), contains the original order of the Commission dated May 2, 1941, and the Report which accompanied it, the latter including the dissenting views of Commissioners Case and Craven. Exhibit C (R. 20-36) is the Commission's opinion on rehearing and the amending order of October 11, 1941 and the dissenting opinion of Commissioners Case and Craven. Exhibit D (R. 36-38) is the Commission's order of March 18, 1938 instituting the chain broadcasting investigation, the proceeding in which the Commission's order complained of was made; and Exhibits E and F (R. 39-43, 43-46) comprise certain notices issued by the Commission in the course of that proceeding.

The American system of furnishing broadcasting service without cost to the listening public is based upon the sale of broadcasting time for advertising purposes. This is a matter of common knowledge and is the basic hypothesis of the Commission's Report. The programs which are

broadcast are of two kinds, "commercial" or "sponsored" programs, which are those sponsored by an advertiser who pays for their broadcasting, and "sustaining" programs which are not paid for by any advertiser but, when of network origin, are furnished by the network (Complaint, Par. Fourth, R. 3). Since the broadcasting industry has, substantially speaking, no revenue except that derived from sale of station time to advertisers, the commercial programs must carry the sustaining ones financially. The Commission said in its Report of May 2, 1941 (R. 61):

> "The eventual success of the practice of selling radio time to advertisers, and the development of network broadcasting, are the foundation stones of the commercial structure of radio broadcasting today."

The affiliation contracts create a cooperative joint enterprise, comprising Columbia and its affiliated stations, designed to compete as a unit, both with other networks and with other advertising media such as national magazines and newspapers, for the advertiser's dollar.

By Paragraph 1 of the contract (R. 13) Columbia agrees to furnish to the Station all available network sustaining programs without charge, and network sponsored (commercial) programs for which clients may request broadcasting by the Station and which are consistent with Columbia's sales and program policies, and agrees to make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Paragraph 3 (R. 14), and the schedule therein referred to, provide the rates at which Columbia pays the Station for broadcasting network sponsored programs.

By Paragraph 2 (R. 13-14) the Station agrees to broadcast all network sponsored programs furnished to it, subject

to certain conditions, one being that, except in connection with occasional special events, the Station need not broadcast network sponsored programs totaling more than 50 "converted hours" (this being on the average equivalent to 79 clock hours, Complaint, Par. Fifth, R. 4) per week, and another being that the Station may require Columbia to give not less than 28 days' prior notice of the commencement of sponsored programs for new accounts. This provision is the so-called "option time" clause, the effect of which is to give Columbia an exclusive option, exercisable on 28 days' notice, on 50 converted hours per week of the Station's time.

By Paragraph 8 (R. 15) Columbia agrees to make the Station the exclusive Columbia outlet in the city in which it is located and not to furnish its exclusive network programs to any other station in that city, except in case of public emergency; and the station agrees to operate as the exclusive Columbia outlet in that city and to so publicize itself, and not to join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations, except to broadcast special events of public importance.

Paragraph 15 (R. 17) provides the term of the contract which (Complaint, Par. Fifth, R. 4) is usually five years.

The Commission's order complained of, as amended, promulgated eight regulations (Exhibits B and C to Complaint, R. 17-20, 32-34) numbered 3.101 to 3.108, inclusive. Regulations 3.107 and 3.108 are not applicable to Columbia. Of the remaining six, Regulations 3.101 to 3.105 affect Columbia's affiliation contracts, and Regulation 3.106 affects Columbia's right to continue operation of one or more of its own stations.

Regulation 3.101 (R. 18) provides that no license shall be granted to a station having any contract with a network organization which prevents the station from broadcasting programs of any other network organization; and Regulation 3.102, as amended (R. 32), provides, among other things, that no license shall be granted to a station having any contract with a network organization which prevents another station serving substantially the same area from broadcasting the network's programs not taken by the former station, with a proviso that this regulation shall not be construed to prohibit a contract whereby the station is granted the first call in its primary service area upon the programs of the network organization. These two regulations would prohibit the substance of Paragraph 8 of the contract containing the reciprocal covenants making the station the exclusive Columbia outlet in the city in which it is located and Columbia the exclusive supplier of network programs for that station.

Regulation 3.103, as amended (R. 32-33), provides that no license shall be granted to a station having any contract with a network organization providing for affiliation for a period longer than two years. This would outlaw the five-year term, which is the normal term of Columbia's contracts with its stations.

Regulation 3.104, as amended (R. 33), contains such drastic prohibitions with respect to the "option time" provisions of Paragraph 2 of the affiliation contract as to make them practically valueless to Columbia. It provides, among other things, that no license shall be granted to a station which options for network programs any time subject to call on less than 56 days' notice (instead of the 28 days now provided) or more time than a total of three hours within each of four defined segments of the broadcast day

(instead of the maximum of 50 converted hours now provided). But, more importantly, it provides that even such options may not be exclusive as against other network organizations, and may not prevent the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations. The effect of this is to outlaw any option of time which would be good as against competing networks.

The effect of Regulations 3.101, 3.102 and 3.104 together is to destroy the network as a joint enterprise, of which the network organization and all its affiliated stations are cooperating members, and to compel a condition whereby, regardless of affiliation relations, every station is available to every network on a "first come, first served" basis. The proviso to 3.102 permits an arrangement whereby an affiliated station might be granted first call upon programs of its network; but 3.104 prohibits any arrangement whereby the network may be given first call upon the time of its affiliated stations. This strikes at the root of the existing affiliation system.

The remaining regulation affecting the affiliation contract, Regulation 3.105 (R. 18-19), provides, among other things, that no license shall be granted to a station having any contract with a network organization which prevents the station from rejecting, in certain described circumstances, network programs. If this regulation were reasonably applied it would not have any considerable effect upon Columbia's practices, since the affiliation contract (Par. 2, R. 13-14) contains liberal provisions on this subject. If, however, the regulation were construed to permit stations to reject network commercial programs which they have already agreed to accept simply because they preferred another commercial program, the effect would be further to weaken the affiliation relationship.

Regulation 3.106 (R. 19) is directed, not at the affiliation contract, but at operation of stations by network organizations. It provides, in so far as it applies to Columbia, that no license shall be granted to a network organization for a station in any locality where the existing stations are so few or of such unequal desirability (in terms of coverage, power, frequency or other related matters) that competition would be substantially restrained by such licensing. This regulation, as construed by the Commission in its Report (R. 124), would require Columbia to dispose of the station owned by it at Charlotte, N. C., and would raise serious doubts whether Columbia would be allowed to continue its ownership of its stations at Minneapolis and Washington, D. C. (Complaint, Par. Seventh, as amended, R. 48).

The regulations relating to the affiliation contracts were intended not only to prohibit the making of future contracts which might contain the proscribed provisions, but to affect existing contracts which include such terms. This results necessarily from the fact that the licenses issued by the Commission are of shorter duration than the usual affiliation contract. Under Section 307(d) of the Communications Act of 1934 no license for the operation of a broadcasting station shall be for a longer term than three years, and under the Commission's practice the actual term of the license has always been much below that maximum. The Complaint alleges (Par. Ninth, R. 9) that it has been the practice of the Commission to renew the licenses of stations annually* and that the licenses held by Columbia's affiliated stations come up for grant or refusal of a renewal thereof at various times commencing in the

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*Since October, 1941, licenses have been issued for a two-year term.

immediate future. It follows that, if a station should make application for renewal of a license expiring, say next month, and should have a contract with Columbia containing the forbidden conditions and having several more years of its term to run, renewal of the license would be denied under the language of the regulations that "No license shall be granted to a standard broadcast station having any contract" containing these provisions. The only way that the station could get a renewal would be to get rid of its subsisting contract with Columbia or at least of those provisions thereof.

The fact that the order did affect, and was intended to affect, existing affiliation contracts is explicitly recognized by the last provision of the original order of May 2, 1941 (Ex. B to Complaint, R. 20):

> "IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties."

The effective date of the regulations, with respect to existing contracts, arrangements or understandings, after having been postponed by the Commission in the meanwhile (R. 452), was deferred until November 15, 1941 by the last provision of the amending order of October 11, 1941 (Ex. C to Complaint, R. 33-34) by language otherwise identical with that above quoted from the original order of May 2, 1941. The suspension of the effective date of the regulations was continued by the court

below, by an order entered on stipulation of the parties on November 12, 1941, until the determination of Columbia's motion for preliminary injunction (R. 455); and after the decision here appealed from, and before allowance of the appeal, the court below entered an order restraining the Commission from enforcing the regulations until May 1, 1942, or the argument of the appeal herein in this Court, whichever is earlier (R. 482). In its unanimous *per curiam* opinion upon the granting of such stay the court below recognized (R. 480) that "if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage".

Both the disruption of Columbia's plan of operations which would be attendant upon enforcement of the Commission's order, and the detriment which Columbia would suffer thereby, amply appear in the record.

They are set forth in the complaint (R. 1-12) in the concise form appropriate to a pleading. It is alleged: that prior to May 2, 1941 stations licensed by the Commission have had a reasonable expectancy of the annual renewal of their licenses, and it has been the practice of the Commission to renew such licenses annually (Par. Ninth); that the Commission has determined that it will revoke, or deny the renewal of, the license of any station having an affiliation contract of the kind now existing, after the effective date of the regulations, with the result that the stations face the loss of their licenses if they perform or continue in force or renew any of their existing contracts containing the prohibited provisions (Par. Ninth); that stations now affiliated with Columbia threaten to and will cancel or repudiate subsisting affiliation contracts, many stations having already notified Columbia that they will not be bound by their contracts after the date when the regulations become

effective as to existing contracts, and that Columbia will be unable to negotiate either renewal of existing contracts with its present affiliates or new affiliation contracts with other stations (Pars. Ninth, Fourteenth); that Columbia's ability to negotiate contracts with advertisers, in competition with other national advertising media, such as magazines and other publications of national circulation, outdoor advertising and the like, as well as to negotiate other sorts of contracts, will be destroyed or seriously impaired (Pars. Sixth, Tenth, Fourteenth); that the enforcement of the regulations would seriously impair Columbia's ability to maintain its identity, and the public goodwill which it has built up, and its ability to render a wide public service of informing, educating and entertaining the nation, would make operation of Columbia's business burdensome and more costly, reduce its earnings, compel it to change the fundamental character of its business and render its property and business substantially less valuable (Pars. Tenth, Fourteenth).

Affidavits* submitted to the court below supported these allegations of the complaint with circumstantial and evidentiary detail.

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*The Government's motion, dated November 7, 1941, to dismiss the complaint or in the alternative for summary judgment (R. 449) was made "upon the compliant herein and upon the annexed affidavit of Telford Taylor, verified the 5th day of November, 1941, and exhibit referred to therein and filed therewith, and upon all the other papers and proceedings heretofore filed and had herein". The Government's motion and the appellant's motion for preliminary injunction were heard together. Such of appellant's affidavits herein referred to as were not served prior to the date of the Government's motion, and so included among the papers on which it was made, were submitted to the Court with no limitation to any particular motion. Where the question is of the jurisdiction of the court over the subject matter of the action, affidavits may be considered upon a motion to dismiss. *Central Mexico Light & Power Co.* v.

The affidavit of Herbert V. Akerberg, Vice President of Columbia in charge of the Station Relations Department, verified October 29, 1941, states (R. 261-263) that the termination dates of Columbia's affiliation contracts are staggered so that they terminate in different years and at different times during the year; that the Station Relations Department is therefore continually engaged in commencing, continuing and completing negotiations for renewal of such agreements; that negotiations for renewal of expiring affiliation contracts ordinarily require from one to six months, and negotiations for contracts with stations not yet affiliated from three months to a year; that not only do the regulations make impossible such negotiations but, as a result of them, many stations have cancelled or repudiated, and many others have threatened to cancel or repudiate, their affiliation contracts even prior to the effective date of the order. Copies of communications to that effect received by Columbia from its affiliated stations prior to October 29, 1941, the date of the affidavit, are attached as Exhibits A to T thereto (R. 263-285); and copies of similar communications received subsequent to that date are attached to Mr. Akerberg's later affidavit verified January 5, 1942 as Exhibits D, E, F, G and H thereto (R. 312-316).

These communications show that many of Columbia's affiliated stations are not willing to await the expiration of their licenses before taking steps to conform their affilia-

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Munch, 116 F. (2d) 85, 87 (C. C. A., 2nd Circ.); *Elkis* v. *Stevens*, 37 F. Supp. 488, 490 (D. C., D. Mass.); *Kentucky-Tennessee Light & Power Co.* v. *Nashville Coal Co.*, 37 F. Supp. 728, 736 (D. C., W. D. Ky.). We confine our references to affidavits to those parts which bear upon the immediateness of the effect of the order, and the injury sustained by Columbia as a result of the order, subjects which are manifestly germane to the question of jurisdiction, particularly in view of the grounds upon which the majority based its decision.

tion contracts with the requirements of the Commission's order. Columbia therefore would be obliged to conduct its business on the basis that those stations were no longer affiliated in any significant sense with its network. They would accept programs from competing networks and they would not even give Columbia an option good against other networks upon any part of their time, since the prohibition against optioning time applies not only to a written contract therefor but to any "arrangement, or understanding, express or implied" (Reg. 3.104, footnote 1, R. 33).

This would seriously impair Columbia's ability to make favorable contracts with national advertisers. The affidavit of William S. Paley, President of Columbia, verified October 30, 1941 shows (R. 243-244) that national advertising efforts must be carefully and scientifically planned; that it sometimes requires months of market study and research, program planning and negotiations, before an advertiser decides whether to use network broadcasting at all or, if so, what stations and programs to utilize; that the national advertiser must have nation-wide coverage both because he sells nationally and because he must give substantially the same support to distributors and retailers in all parts of his territory; that under such circumstances it is practically impossible to sell an advertiser the use of networks, a program idea, program talent and the like, when the network is not able to know and inform the advertiser in advance what stations and what time the network has to offer, in short what circulation he would get for the money he would spend; that under the Commission's regulation with respect to option time the network might spend months of effort in convincing the sponsor, in helping him select the territory in which to broadcast his program, the stations to utilize, the character of the program and the talent, and then find itself un-

able to provide either the stations or the time desired by the advertiser in the markets which he desires to cover. Radio's chief competitors for the advertiser's dollar, such as the newspapers and magazines having national distribution, are able to assure advertisers of a definite circulation, and radio networks will be unable to meet their competition unless they are able to give advertisers corresponding assurance with respect to the circulation they can deliver (Paley affidavit, R. 231, 244). Under Regulation 3.104 it would be not only possible but probable that during the course of such a negotiation between Columbia and a national advertiser for, say, the hour between eight and nine on Monday evenings, one after another of the stations supposed to be on Columbia's network would disappear because that hour, or what would be just as bad some quarter or half hour within it, had been preempted by other networks. Obviously, the loss of even a few such stations, if they were strategically located to serve major markets which the advertiser desired to cover, would be enough to make the network no longer satisfactory to him.

Since the entire economic structure of radio broadcasting is based upon the sale of station time to advertisers (Paley affidavit, R. 225), impairment of the attractiveness of Columbia's network to national advertisers would lead to gradual disintegration of all its operations. Many of Columbia's most important activities are not directly revenue-producing. Its sustaining programs, which in 1940 cost it five million dollars (Paley affidavit, R. 230), bring it no direct income and are furnished to its affiliated stations without direct cost to them (*id.*, R. 224, 226). These include many of its most distinguished cultural programs such as the broadcasts of the New York Philharmonic-Symphony Orchestra, the Cincinnati Conservatory of Music, and other

programs of classical music, the Church of the Air, the School of the Air, broadcasts of special events of public importance, etc. (Affidavit of Frank Stanton, R. 319, 327-328), and many of the most important programs of news and news analysis (*id.*, R. 318-319; Paley affidavit, R. 230). Reliable studies show that radio broadcasts are more largely relied upon by the people as a source of news even than newspapers, especially in rural communities and smaller cities and towns (Stanton affidavit, R. 320-326).

Columbia's stability as a national network by virtue of its affiliation contracts, which give it a dependable relation with its stations and a reasonable continuity of affiliation, has enabled it to establish standards for various types of programs which at once serve the public interest and promote its own business interests by maintaining a character and reputation which contribute largely to its goodwill (audience) and its resultant ability to make advantageous sales of time to advertisers (Affidavit of Edward Klauber, R. 329). Some of these formulations of policy appear in the affidavits or exhibits thereto: Strict standards of suitability for commercial programs and of the products which they advertise (Paley affidavit, R. 230, and Ex. B thereto, R. 254-260); refusal to sell time for discussion of controversial public issues, except to political parties during campaigns, and the allotment, instead, of time impartially to spokesmen of opposing views on a non-commercial basis through sustaining programs (Klauber affidavit, R. 329-331); objective standards for broadcasts of news analysis (*id.*, R. 331-333), especially in war reporting (Exs. A and B to Klauber affidavit, R. 335-345); and insistence that religious broadcasts shall be widely representative of all faiths and shall never be commercial programs (Klauber affidavit, R. 333-334). Because of its strict adherence to high program standards, Columbia has

refused many million dollars of network business tendered to it in the last few years (Paley affidavit, R. 230).

It is apparent that Columbia is essentially a publication, addressing the ear rather than the eye, the nation-wide audience reached through its owned and affiliated stations corresponding to the circulation of a national magazine or the newspapers; and that its reputation for program material is as important to its business integrity and good-will as is the reputation of the contents of any printed periodical.

The Commission's regulations, prohibiting exclusive relations with affiliated stations and any option on their time which would be good against other networks, would, if enforced, inevitably endanger the integrity and usefulness of Columbia's network operations. In the first place, the loss of business from advertisers to competing advertising media such as newspapers, magazines and outdoor advertising, would so reduce its revenues that it could not afford to produce sustaining programs of the expensive and distinguished character that it has in the past. In the second place sacrifices of immediate revenue such as Columbia has hitherto made, either by withdrawing time from sale to make room for important public service and other sustaining programs or by rejecting sponsored programs deemed unsuitable under its standards, would be made at greatly increased peril. At present, because of its genuine option upon a part of the time of its affiliated stations, Columbia knows that when it makes such a sacrifice it is losing no more than the sale value of the particular time involved and can replace that with sufficient revenue-producing broadcasts to make a profit, provided the business is available and Columbia competitively able to get its share. But without such option, the remaining time, on which Columbia hitherto has been able to rely, might be preempted, period after

period, and station after station, by other networks and thus permanently lost. Finally, Columbia's financial returns, even from the eight stations owned or leased by it would be adversely affected. Each one of them is a part of Columbia's national network and derives an important part of its income from broadcasting network programs. Any impairment of Columbia's ability to obtain lucrative network commercial programs from advertisers, due to interference with its relations with its affiliated stations, would cause an immediate adverse reaction upon the eight stations which Columbia itself operates.

On the day following the verification of the complaint and the filing of this suit, the Commission passed its so-called "minute" of October 31, 1941. This appears in the affidavit of Telford Taylor, verified November 5, 1941, annexed the Government's motion to dismiss the complaint. This supervening minute furnished a major ground of the majority opinion in the court below and a copy of it is appended to that opinion. The minute reads (R. 453):

> "If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled

thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

We shall discuss fully in the argument the bearing of this minute upon the jurisdictional question. It is sufficient for the purpose of this statement to observe that by its terms the minute applies only to a station which "wishes to contest the validity of the Chain Broadcasting Regulations".

Prior to the allowance of this appeal the court below, on application of Columbia, made an order restraining the Commission until May 1, 1942, or the argument of the appeal, whichever is earlier, from enforcing the regulations issued in their amended form on October 11, 1942 (R. 482). In connection with the making of this order the District Court made findings of fact as follows (R. 481):

"I. That if the Federal Communications Commission, pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment — has in fact jurisdiction over the cause of action stated in the complaint; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public compensurate with the injury to the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist."

SPECIFICATION OF ERRORS

The District Court erred

1. In dismissing the complaint on the ground that the court had no jurisdiction over the subject matter of this suit;

2. In failing to find that it had jurisdiction to issue the injunction prayed for herein;

3. In failing to consider on the merits appellant's application for preliminary injunction.

ARGUMENT

The majority opinion in the court below held in effect that Subdivision (a) of Section 402 of the Communications Act of 1934 does not authorize a suit to set aside the order here involved because Congress intended that issues of the sort here raised should be reviewed only upon appeals to the Court of Appeals for the District of Columbia from the Commission's denial of renewals of licenses to individual stations, under the provisions of Subdivision (b) of Section 402. The full text of Section 402 is set forth in the appendix to this brief (*infra*, pp. 53-55).

As this Court said in *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U. S. 132, the Act "bifurcates" permissible judicial review of action by the Commission. See also *Scripps-*

Howard Radio, Inc. v. *Federal Communications Commission*, No. 508, October Term, 1941, decided April 6, 1942, 10 U. S. Law Week 4322.

Section 402(a) authorizes "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission", with stated exceptions, to be brought as provided in the Urgent Deficiencies Act. The stated exceptions are orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license". As to these five excepted classes, Section 402(b) authorizes appeals from decisions of the Commission to the Court of Appeals of the District of Columbia under procedure set forth in subdivisions (c) (d) (e) and (f) of Section 402.

The majority does not hold that the order here involved is one of those excepted in subdivision (a) and specified in subdivision (b). Manifestly it could not so hold. Its theory is rather that the questions presented in this litigation as to the legality of the order are of the same sort as would be involved upon an appeal to the Court of Appeals of the District of Columbia under Section 402(b) from action of the Commission denying renewal of a license to an individual station on the ground that it had violated the regulations promulgated by the order; and therefore Congress must be deemed to have intended that such an appeal be the sole remedy of anyone aggrieved by the Commission's order.

The majority opinion expresses doubt (R. 460) whether the Commission's order here involved would, even apart from the supposed legislative intention which it derives from Section 402(b), be the sort of order which would be reviewable under Section 402(a). But it expressly refrains

from deciding that question. It suggests (R. 460) that, if the order be not of the sort reviewable under 402(a), Columbia may have a remedy through another sort of suit under the general equitable jurisdiction. But, it does not decide that such a suit would lie. It dismisses as irrelevant Columbia's allegations that there is no assurance that any of its affiliated stations would challenge the regulations, holding that, whether or not any affiliated station elected to contest, Columbia would have an opportunity and a standing to intervene before the Commission on applications by stations for renewal of licenses and to appeal from "any order imposing unlawful conditions upon an 'affiliate's' license", and that this is "an adequate remedy under sec. 402 itself" (R. 462).

In the ensuing points we shall show, first, that the grounds upon which the majority rested its decision below are untenable, and, second, that this suit is properly brought under Section 402(a).

FIRST: THE COMMUNICATIONS ACT OF 1934 CONTAINS NO WARRANT FOR RELEGATING COLUMBIA TO INTERVENTION BEFORE THE COMMISSION UPON APPLICATIONS OF INDIVIDUAL STATIONS FOR RENEWAL OF THEIR LICENSES, AND APPEALS TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA UNDER SECTION 402(b) FROM THE COMMISSION'S ACTION THEREON.

(a) The Act discloses no legislative intention to exclude the order here involved from review under Section 402(a).

Subdivision (a) of Section 402 is the inclusive provision for review. It authorizes broadly "suits to enforce, enjoin, set aside, annul, or suspend *any** order of the Com-

*All italics in quotations in this brief are supplied unless otherwise noted.

mission", except the five classes particularly specified in the parenthetical exception. Except for them it states no limitation. Nor does the Urgent Deficiencies Act state any limitation. Its provisions, in so far as they are pertinent here, merely prescribe the procedure to be followed in the suit. It is well settled by authorities in this Court under the Urgent Deficiencies Act that review thereby provided is normally available to a person injured by an order of an administrative body, to which its procedure is made applicable, although the order relates to the conduct of others. *The Chicago Junction Case,* 264 U. S. 258; *Assigned Car Cases,* 274 U. S. 564. The language describing the five classes of proceedings excepted in Section 402(a) is to be construed according to its natural meaning and not extended by implication (*Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.,* 311 U. S. 132, *supra*).

The majority opinion below based its conclusion as to the presumed intention of Congress upon the assumption that the questions relating to the validity of the Commission's order as presented in this suit are the same as those which would be involved on an application by an individual station for renewal of its license, review of the denial of which would be under Section 402(b). It said (R. 461):

> "* * * Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a 'station' applies for renewal; exactly the question which will determine the actual renewal of a license."

But even if the supposed similarity, or even identity, of issues in fact obtained, that is not enough. It is the type of proceeding, and not the character of the questions involved therein, which governs.

As the majority below recognizes (R. 461-2), the issues here presented, insofar as they relate to individual stations, might be raised either by an application for renewal of license by a station under Sections 307, 308 and 309, or by a revocation of the station's license by the Commission under Section 312(a). If the right to revoke the license were asserted on the ground that the station persisted in maintaining its existing affiliation contract with Columbia, the questions presented with respect to the Commission's order would be identical with those which would be involved if the Commission denied the station's application for renewal of its license upon the sole ground that it had not abrogated its affiliation contract. But, under Section 402, review of the order of revocation in the former case would be by a three-judge district court under the Urgent Deficiencies Act as provided by subdivision (a), whereas a review of the order denying the renewal of the license in the latter case would be by the Court of Appeals of the District of Columbia under subdivision (b). *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* No. 508, October Term, 1941, *supra.* This was conceded by the Government in its brief below.

The extent of the misapprehension of the majority below with respect to the intention of Congress in providing the "bifurcation" of review procedures embodied in Section 402 is strikingly revealed by the passage in its opinion which discusses the revocation possibility. Following the passage from which we have above quoted, regarding the "anomalous result" which the majority supposed would follow from

permitting the same questions which would arise upon a license renewal application to be presented in a suit to review the Commission's order under Section 402(a), the majority said (R. 461-2):

> "To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under sec. 312(a); *even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission.*"

The majority's conclusion, which we have italicized in the above quotation, is patently incorrect.

In the *Scripps-Howard Radio, Inc.* case, *supra*, this Court said that

> "* * * if the Commission on its own motion modifies a station license, review is had under § 402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under § 402(b) to the Court of Appeals for the District of Columbia. *Both cases give rise to the same kind of issues on appeal.*"

Certainly also a ruling on an application for consent to the transfer of a station license presents issues under the test of "public convenience, interest and necessity" which would be in most cases very similar, and in many cases identical, with those which would be involved if the proposed transferee, instead of seeking a transfer of the license of another, made an application for a new construction permit or license to itself. But this Court held in *Fed-*

eral Communications Commission v. *Columbia Broadcasting System of California, Inc.*, 311 U. S. 132, *supra*, that review of such a ruling under Section 402(b) would not lie.

It follows, therefore, that the fundamental hypothesis upon which the majority below predicated its theory of the presumed intention of Congress to make the procedure provided in Section 402(b) the sole remedy of any suitor, whose case involves questions of a character which might be raised in proceedings of the five classes contained in the parenthetical exception to Section 402(a), is wholly without foundation. Its assumptions are flatly contradicted by opinions of this Court.

(b) The suggested substitute procedure of intervention on particular license applications, and appeal under Section 402(b), is either unavailable to Columbia or inadequate.

(1) *The suggested substitute procedure is completely unavailable to Columbia if its affiliated stations fail to contest the Commission's order but submit to its requirements.*

To take advantage of the procedure suggested in the majority opinion, Columbia would have to wait at least until an application for renewal of license were presented to the Commission by one of its affiliated stations. The suggested procedure would then be that Columbia would attempt to intervene before the Commission and, if renewal were denied, appeal to the Court of Appeals of the District of Columbia from the resulting order. Passing all the difficulties, which we shall describe in the next subdivision, of this procedure even if the station contests the Commission's order, we proceed to examine the position of Columbia in case the station does not contest. The majority below dismisses this possibility as irrelevant (R. 462), but obviously it is not.

If the station elected not to contest, but to submit to the requirements of the order, it could simply file with the Commission a declaration, or otherwise notify it, that it had abrogated all of the provisions of its affiliation contract denounced by the Commission's regulations, and that it would in the future govern its conduct according to their requirements; that it would accept programs from any network organization, would give Columbia no option on its station time which would prevent its sale thereof to any other network, and would reserve the right to reject any program offered it by Columbia under the conditions specified by the Commission.*

The Commission could be expected to treat a station which notified it that it had abrogated the provisions of its affiliation contract which the regulations proscribe, and would conduct its operations accordingly, as sufficiently complying with the order. The Commission would be interested in the conduct of the station, not its legal justification therefor as against Columbia. The latter question it would leave to Columbia to fight out with its stations if so advised. It would therefore renew the license. This would

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*It is idle to debate the question whether, as a matter of legal right, the station would be entitled thus unilaterally to abrogate or amend its affiliation contract. The majority opinion below (R. 461) says that, until the Commission imposes the conditions embodied in its regulations, "no change is made in the status of the 'affiliates' meanwhile; their existing contracts with the 'network' remain enforceable * * *." But, however legally unjustified repudiation by a station of its affiliation contract might be, it is difficult to see what as a practical matter Columbia could do to force its affiliates either to perform or contest. Separate suits against 115 affiliated stations in nearly as many separate jurisdictions would scarcely be an efficacious course. Even assuming that all would be successful, there could be no assurance of interlocutory relief which alone would protect Columbia's network against disintegrating during the time when this multiplicity of suits was in process of litigation.

be, from the point of view of the Commission, an entirely safe procedure since, if the station's subsequent conduct did not square with the declaration of intention on which it had secured renewal, the Commission could proceed to revoke its license under Section 312(a).

In these circumstances it is difficult to see how there would be any proceeding in the Commission in which Columbia could intervene, or any order which could be the subject of an appeal by Columbia to the Court of Appeals of the District of Columbia. The majority below assumes that *any* action upon an application for renewal would involve an application of the regulations which Columbia could review on appeal. But the terms of the Act give no such assurance. Under Section 309(a), "If upon examination of any application * * * for the renewal * * * of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the * * * renewal * * * thereof in accordance with said finding"; and it is only "In the event the Commission * * * does not reach such decision", that it is required to set the application for hearing. Thus, if the Commission concluded that a station has complied with its regulations, it could simply find that "public interest, convenience or necessity" would be served by the renewal of its license and renew the same without formality. The station's license would have been neither denied nor modified. The Commission would urge with force that there had been no imposition of unlawful conditions as the majority below supposed (R. 462), and that what had damaged Columbia was not action by the Commission, but action by the station. Upon what, then, would Columbia predicate an appeal to the Court of Appeals of the District of Columbia?

The Commission's minute of October 31, 1941 is wholly ineffective to protect Columbia from that situation. It provides that *"If a station wishes to contest the validity"* of the regulations, "its license will be set for hearing", and there follow provisions insuring that the station in that event may remain on the air, pending such contest and appeal from the Commission's decision, through temporary extensions of the license from time to time until there has been a final determination of the issues. This of course has no application if the station does not contest.

The facts set forth in the Statement (*supra*, p. 16) show that, even if only a few of Columbia's affiliated stations located in strategic communities elected to comply with the Commission's regulations, Columbia's integrity as a network would be irreparably disrupted. We submit that the complaint sufficiently alleges (R. 11-12) that no station will contest. The majority below decided the case on that hypothesis (R. 462), though saying that it seems little "likely to be the case". But the latter assumption is unwarranted. There are many reasons why stations generally would be unwilling to contest. One reason would be reluctance to assume the burden of hearings before the Commission and subsequent litigation in the Court of Appeals of the District of Columbia, both of which are in Washington and far distant from the localities in which many of these stations operate. But another and perhaps more powerful deterrent would be the reluctance of the station to incur the displeasure of the Commission to which it is continuously a suppliant in matters essential to its operations and on which indeed it is dependent for its economic welfare and often indeed for its very life.*

*Mr. Paley's affidavit, filed subsequent to the decision below, on the motion for stay, stated that he knew of no station which was prepared to contest (R. 476).

(2) *Even if a station does contest, the suggested substitute procedure is wholly inadequate.*

Any proceedings before the Commission on the application for renewal of license, and any appeal under Section 402(b) from the Commission's action thereon, would affect only the particular station whose license was involved. Meanwhile the Commission's regulations would become effective as to the contracts of all other stations. Even though, under this Court's decision in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* No. 508, October Term, 1941, *supra,* a stay might be obtained from the Court of Appeals of the District of Columbia with respect to the particular station, there would be no effective vehicle for suspending the effect of the order on the other stations, and accordingly no way of protecting Columbia from the injury which we have described in the Statement. The practical certainty that a large proportion, at least, of the stations would not contest at all, would cause Columbia's network to disintegrate before the question of the power of the Commission to make the order could be judicially determined. One of the findings of fact made by the court below on the granting of the stay (*supra,* p. 20) was (R. 481):

> "II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity."

In addition, there is no assurance that if a station contested the proposed denial of its station license the decision of the Commission would be based upon a ground which necessarily involved the validity of the regulations. To provide a clear-cut test of that issue, the station would have to be one to which no objection other than its non-

compliance with the Commission's regulations could possibly be made under the test of "public interest, convenience or necessity".

Assuming, however, that a case is presented on the part of a station which desires to contest and whose right to a renewal, apart from the provisions of its affiliation contract, is clear, there is no assurance that Columbia would be permitted to intervene in the hearing on the application for renewal. The majority below recognize (R. 462) that the Act does not in terms provide that Columbia may be heard in the proceeding before the Commission under Section 309(a), but it says that Section 1.102 of the Commission's Rules permits intervention. We set forth this rule in the margin.* Plainly, the phraseology of this rule might be construed to leave avenues of escape for a commission which did not desire to permit an effective intervention. And the Commission itself in one of its decisions (*In re Application of Hazelwood, Inc., Orlando, Florida*, Docket No. 5698, decided Sept. 29, 1939, as quoted in *In re Matheson Radio Co., Inc.*, 2 Pike and Fischer Admin. Law, 41g.23-1,-3, footnote 4), said:

> "The fact that a proposed intervenor may have the right to contest in a court the validity of an

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*"§ 1.102 Intervention.—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim *that his intervention will be in the public interest*, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such position *shall not have the effect of changing or enlarging the issues* which shall be those specified in the Commission's notice of hearing *unless on motion the Commission shall amend the same.*"

order granting or denying a particular application does not in and of itself mean that such person is entitled as a matter of right to be made a party to the proceedings before the Commission on such application."

The majority opinion below says (R. 462) that

"An unreasonable refusal of the privilege [of intervention] so offered [by Regulation 1.102] would appear to be a good objection on appeal under sec. 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal."

But there can be no such assurance. This Court, in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, in discussing the authority of the Commission under the Communications Act of 1934, said (p. 138):

"* * * Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, *whether parties should be allowed to intervene in one another's proceedings,* and similar questions *—were explicitly and by implication left to the Commission's own devising,* so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

Again the Commission's minute of October 31, 1941 is of no assistance to Columbia. By its express terms it is

intended only to provide relief for a *station* which wishes to contest the regulations. It contains nothing which gives any assurance to the *networks* of an opportunity to intervene and make a record which would present to the Court of Appeals of the District of Columbia in satisfactory form the question of the validity of the regulations. And neither the minute nor the statute provides any means whereby Columbia might preserve the *status quo* pending the determination of the validity of the Commission's order.

(c) Proceedings on the application of an individual station for renewal of its license do not afford an appropriate review of the Commission's order here in question.

The review of the Commission's order should correspond with the scope of objective of the Commission in making it. That objective was to promulgate general all-embracing regulations designed to eliminate provisions in contracts between stations and network organizations which the Commission regarded as probably infringing the anti-trust laws or at any rate unduly restrictive of competition. They apply indiscriminately to every station having contracts containing such provisions.

Manifestly, proceedings upon applications of particular stations for renewal of their licenses do not afford, either in substance or even in form, a review ~~of that~~ order. Appeal to the Court of Appeals of the District of Columbia under Section 402(b) could not be a review of the order promulgating those regulations. It would be a review of another order, denying renewal of a station license, in which the question of the validity of the order promulgating the regulations would be involved only as indicating the ground on which the order refusing the license renewal had been predicated.

No review under Section 402(b) could possibly involve a comprehensive consideration of the total effect of the order. The question is of the authority of the Commission to enforce, through regulations of this character, its views as to the promotion of competition among networks and stations. The order should be reviewed as a whole. This can be done only in a suit like the present one under Section 402(a). It cannot be done under the substitute procedure under Section 402(b) suggested by the majority below.

SECOND: THE REQUIREMENTS FOR A SUIT UNDER THE URGENT DEFICIENCIES ACT, MADE APPLICABLE BY SECTION 402(a) OF THE COMMUNICATIONS ACT OF 1934, ARE SATISFIED IN THIS CASE.

In a suit under the Urgent Deficiencies Act "the district court sits as a court of equity" (*United States* v. *Morgan,* 307 U. S. 183, 191); and the plaintiff invokes "the court's equity powers" (*Inland Steel Co.* v. *United States,* 306 U. S. 153, 156). "The proceeding in the court is not an appeal; it is a plenary suit in equity" (*F. H. Peavey & Co.* v. *Union Pacific Railroad Co.,* 176 Fed. 409, 417 (C. C., W. D. Mo.), modified and affirmed *sub nomine Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42).

The opinion of this Court in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, involving action by the Federal Communications Commission, indicates that Section 402(a) provides for court review under the provisions of the Urgent Deficiencies Act if (1) there is a "case" or "controversy" under Article III, Section 2, of the Constitution, (2) the conventional requisites of equity jurisdiction are satisfied, and (3) there is an "order" within the meaning of the Act.

There can be no question that this case satisfies the constitutional requirements of "case" or "controversy". *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156. That it also satisfies the other two requirements necessary to establish jurisdiction in the District Court is shown in the following argument.

(a) This case satisfies the conventional requisites of equity jurisdiction.

(1) *Columbia has standing to sue.*

The complaint shows that the order invades and will continue to invade legal rights of Columbia in the form of property rights, contract rights and the right to freedom of contract. Although it is directed at stations, the order injures Columbia as a network organization.

That legislative or administrative action which thus interferes with an existing or potential contract or business relationship may be challenged by one of the parties thereto, even where the offending act or order purports to be directed only at the rights of the other party, is shown by numerous analogous cases.

In *Truax* v. *Raich*, 239 U. S. 33, a native of Austria was held to have standing to sue to enjoin enforcement of a state statute requiring his employer to employ at least 80% qualified electors or native-born citizens. His employer had informed him that on the effective date of the statute he would be discharged solely because of the statute. This Court said (pp. 38-39):

> "* * * The employé has manifest interest in the freedom of the employer to exercise his judgment with-

> out illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. * * * It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employés to bring the alien quota within the prescribed limit."

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, it was held that a corporation conducting private schools had standing to sue to enjoin enforcement of a state statute which required parents of children of certain ages to send them to public schools. The plaintiff showed that the successful conduct of its business required long-term contracts with parents and that the act was causing and would cause withdrawal from the plaintiff's schools of children who would otherwise continue to attend them. This Court said (pp. 535-536):

> "Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule ap-

proved in *Truax* v. *Raich, Truax* v. *Corrigan* and *Terrace* v. *Thompson, supra,* and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers." (Italics in original.)

In *United States* v. *Village of Hubbard,* 266 U. S. 474, a municipality sued under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission requiring increases of intrastate interurban passenger fares on electric railroads. The district court set aside the order. This Court reversed the decree of the district court on the merits without discussion of the standing of the municipality to sue. This was discussed, however, in the later case of *Alexander Sprunt & Son, Inc.* v. *United States,* 281 U. S. 249, this Court distinguishing the *Village of Hubbard* case as one involving "an independent legal right of the plaintiff", pointing out that the challenged order "was alleged to violate a contract between the plaintiff and the carrier" (p. 257).

For additional cases, several of which arose under the Urgent Deficiencies Act, showing that the injury complained of by Columbia is such as to give it standing to maintain this suit, including cases in which the injury complained of resulted from interference by unauthorized government action with *potential* contracts or business relationships instead of with existing contracts, see: *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382; *Terrace* v. *Thompson,* 263 U. S. 197; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *The Chicago Junction Case,* 264 U. S. 258; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557; *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42; *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture,* 120 F. (2d) 258 (C. C. A., 7th Circ.). In *Terrace* v. *Thomp-*

son, supra, where it was held that an owner of land who proposed to lease it to an alien could sue to enjoin enforcement of a state Alien Land Law which provided that an alien should not take or hold land, this Court said (pp. 215-216):

> "* * * If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that after the making of the lease the validity of the law might be determined in proceedings to declare a forfeiture of the property to the State or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. * * * The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevent each from dealing with the other. *Truax* v. *Raich, supra.*"

(2) *The suit is not premature.*

Columbia's application for preventive relief is not premature by reason of the fact that the "effective date" of the regulations with respect to "existing contracts, arrangements, or understandings, or network organization station

licenses" was deferred by the Commission to a date after the date of the commencement of this suit (R. 33-34). In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (*supra*, p. 37), where the challenged statute was not to become effective until a date more than a year after the case was finally decided, this Court said (p. 536):

> "The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

See also the opinion of the district court, 296 Fed. 928, 933-935 (D. C., D. Ore.). In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, where it was held that Pennsylvania could sue to enjoin enforcement of a statute of West Virginia requiring producers of gas to satisfy the needs of West Virginia customers in preference to those of other customers, this Court said (pp. 592-593):

> "The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

In *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, enforcement of an order of the Interstate Com-

merce Commission was enjoined in a suit under the Urgent Deficiencies Act commenced before the effective date of the order. See also *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 287-288; *Terrace* v. *Thompson*, 263 U. S. 197, 215-216; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386; *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, 34.

Nor is Columbia's application for preventive relief premature by reason of the fact that the government action complained of was the promulgation of regulations involving the denial of licenses in the future. In *Waite* v. *Macy*, 246 U. S. 606, importers of tea sued to enjoin a board of assessors from applying to tea imported by the plaintiffs a regulation promulgated by the Secretary of the Treasury. The statute provided that, if the plaintiffs' tea were entered in the customs house and excluded under the regulation, the plaintiffs could have the matter reexamined by the board. Instead of waiting to have the tea examined, the plaintiffs resorted directly to the courts. This Court held that they were entitled to do so. In *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, an owner of unimproved land sued to enjoin the Village from enforcing a zoning ordinance on the ground that because of certain restrictions imposed by it the ordinance operated to reduce the market value of his land. This Court held that the suit was not premature, saying (p. 386):

> "A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force

operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See *Terrace* v. *Thompson*, 263 U. S. 197, 215; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535."

(b) The order complained of is an "order" within the meaning of the Act.

Respondents argued below that the order complained of is not reviewable because the regulations amount merely to an expression of a general policy regarding the granting of station licenses, which might rest in a deliberative stage until applied on specific applications, and do not constitute the Commission's ultimate determination on any issue. This argument is manifestly inconsistent with the nature and form of the order, the character of the proceeding in which it was made, the Commission's own construction of the order, and the obvious intention of the Commission with respect to the application of the regulations.

The order is legislative in character, and was made as the final act in a proceeding instituted in aid of the Commission's rule-making power. The Commission's order No. 37, instituting the proceeding, specifically bases it on the Commission's power under Section 303 (i) "to make special regulations applicable to radio stations engaged in chain broadcasting". The order enacts that "no license shall be granted" to a station having an affiliation contract containing any of the proscribed provisions, and the Com-

mission in its Report justifies such legislation on the ground that "The formulation of a regulation in general terms is an important aid to *consistency* and *predictability*" (R. 141).

The immediateness of the effect of the regulations is recognized by the Commission itself by the provisions of the original order and the amending order postponing their "effective date" with respect to "existing contracts, arrangements, or understandings, or network organization station licenses", and similarly providing for the postponement of the "effective date" of Regulation 3.106 "in order to permit the orderly disposition of property", and by the meticulousness with which since the dates of those orders the "effective dates" have been further postponed from time to time (*supra*, pp. 11-12).

The order is not an "interim step" (*Rochester Telephone Corp. v. United States*, 307 U. S. 125, 131) in any proceeding. It completed the proceeding in which it was made. It is no more an interim step in licensing proceedings than is any of the sections of the Communications Act of 1934 which state the grounds upon which licenses may be granted or denied. The order obviously does constitute the Commission's ultimate determination. The regulations which it promulgates lay down the conditions with which an applicant must comply to obtain a license. It is perfectly plain that the Commission does not intend to reexamine any of them in any important respect.

Respondents also argued below that the order complained of is not reviewable because it does not compel conduct on the part of anyone and has no present effect. Assuming for the present, *arguendo*, that this is necessary to the reviewability of an order made under the rule-making power, this order does compel conduct and is presently effec-

tive. It in effect commands and compels affiliates to free themselves from their affiliation contracts with Columbia as a condition precedent to renewal of their licenses. The affidavits of Herbert V. Akerberg show that the order has had and is continuing to have *de facto* effect in that direction even though because of successive suspensions it has not become effective *de jure* (R. 263, 309). The acts and statements of the Commission show that the order was intended to have just this effect. The Opinion on Rehearing contains statements to the effect that the regulations "prohibit" certain things (R. 24, 25, 28).

In its brief below (p. 11, footnote) the Commission said:

> "In the event that the Chain Broadcasting Regulations are not complied with, the Commission could proceed against licensees either by revocation hearings or by setting their licenses down for hearing on renewal. As indicated in the Commission's Minute of October 31, 1941, the latter procedure will be followed."

As to revocation, Section 312(a) of the Act provides that "Any station license may be revoked * * * for violation of or failure to observe any of the restrictions and conditions of this Act *or of any regulation of the Commission authorized by this Act*". The fact that the Commission treats failure to observe its regulations as cause for revocation of licenses shows that in the Commission's view the regulations are self-executing and presently operative. It makes no difference whether it presently intends to avail itself of that remedy or not.

The form in which the Commission at first proposed to couch its regulations is highly significant. Most of the proposed regulations set forth in the Commission's notice of

November 28, 1940 (Ex. F to Complaint; R. 43-46), which ordered argument on such regulations, began with the express prohibition, "No licensee of a standard broadcast station *shall enter into* any contractual relation, express or implied, with a network organization which" etc. It could hardly be argued that an order promulgating regulations embodying such direct prohibitions would not be a reviewable "order". But it is the height of unreality to distinguish between that language, in the regulations as proposed, and the language finally adopted that "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which" etc. The difference is purely verbal. In all substantial respects the effect is the same. Compulsion is inescapable. Stations have no choice. They must comply or lose their licenses. Networks have no choice. They must have station outlets, either their present affiliates or some others. But neither present nor new affiliates can stay on the air if they have contracts containing the forbidden provisions.

On the question of jurisdiction under the Urgent Deficiencies Act it is the substance, and not the form, which governs.

In *Powell* v. *United States,* 300 U. S. 276, where such jurisdiction was upheld to review an order of the Interstate Commerce Commission that a certain tariff filed by a railroad be stricken from the Commission's files, this Court said (pp. 284-285):

> "The United States and the Interstate Commerce Commission contend that the commission's order is not reviewable under the statute. They do not suggest that the order is a negative one or that the commission did not make an utterance which in form purported to be an order. But they say that

it is not directed to any party; it requires no one to do or to refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance 'except as a record of a certain completed act performed by the Commission.'

But overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. By it the commission meant to put an end to the tariff in question and the service of the Seaboard according to its terms."

In *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, where it was held that a certification by the National Labor Relations Board of a bargaining representative of employees under Section 9(c) of the National Labor Relations Act was not a "final order" reviewable under Section 10(f) of the Act, this Court said (p. 408):

"In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders.' See *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130, 135, *et seq.; Federal Power Comm'n* v. *Pacific Power & Light Co.,* 307 U. S. 156."

On this question of form and substance, the Commission faces both ways according to the exigencies of its effort to escape review. To support its contention that the Commission's action was nothing more than a declaration of inten-

tion, which did not require an order but which could as well have been promulgated by public announcement or even a press release, it urges that the plain fact that its action was taken by the making of an "order" be disregarded as a mere matter of form. But in combating our argument that the regulations promulgated by the order have immediate effect, it insists that substance be disregarded and the form of language used be exalted as the controlling consideration.

There is ample precedent for holding that the order promulgating regulations of this sort is a reviewable "order".

In *American Telephone & Telegraph Co.* v. *United States*, 14 F. Supp. 121 (D. C., S. D. N. Y.), aff'd 299 U. S. 232, numerous telephone companies brought suit under the Urgent Deficiencies Act to set aside an order of the Federal Communications Commission, made under its rule-making power, prescribing generally a uniform system of accounts for telephone companies, under Section 220(a) of the Communications Act of 1934 which provides that "The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers". Such an order is, for jurisdictional purposes, fairly analogous to that here involved which purports to be based in part at least on Section 303(i). The case was heard and determined on the merits, the decision sustaining some of the plaintiffs' objections to the order and overruling others. It was affirmed by this Court on the merits.

In a number of cases where suits were brought under the Urgent Deficiencies Act to review orders of the Interstate Commerce Commission promulgating rules and regulations, this Court has rendered decisions on the merits without questioning the propriety of the lower courts' exercise of jurisdiction. *United States* v. *Baltimore &*

Ohio Railroad Co., 293 U. S. 454 (order of Interstate Commerce Commission amending general rules previously promulgated by Commission so as to prescribe power-operated reverse gears for all steam locomotives); *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80 (order of Interstate Commerce Commission prescribing general rules regulating car hire settlements); *Assigned Car Cases*, 274 U. S. 564 (order of Interstate Commerce Commission establishing a general rule of coal car distribution). Like jurisdiction has been exercised to review decisions of the Commerce Court. *Kansas City So. Ry. Co.* v. *United States*, 231 U. S. 423 and *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194 (regulations of Interstate Commerce Commission prescribing methods of bookkeeping for carriers).

In *Lambert Run Coal Company* v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377, this Court affirmed the dismissal of a suit by a coal company against a railroad company brought under general equity jurisdiction to enjoin the latter from applying certain rules of coal car distribution which had been promulgated by the Interstate Commerce Commission, upon the express ground that the suit was in substance one to set aside an order of the Commission and therefore should have been brought against the United States under the Urgent Deficiencies Act. Accord, *Corona Coal Co.* v. *Southern Railway Co.*, 260 U. S. 698, aff'g 266 Fed. 726.

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, a telephone company sued under the Urgent Deficiencies Act, as made applicable by Section 402(a) of the Communications Act of 1934, to set aside an order of the Communications Commission which classified the company as one subject to all common carrier provisions of the Act and, therefore, subject to all orders of the Telephone

Division of the Commission, instead of classifying it as a connecting carrier within an exception in the Act. Although this Court affirmed on the merits a decree dismissing the complaint, it expressly held that the order was reviewable under the Urgent Deficiencies Act, overruling a contrary contention made under the previously-held doctrine with respect to "negative orders." This Court's opinion classified (pp. 129-30) the prior decisions denying review under the "negative order" doctrine into three categories, explained the reasons for previous denials of review in each category, and concluded (p. 143) that "any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding".

The importance of the *Rochester* case is not that the order here in question could conceivably be construed as a "negative" one even under this Court's previous authorities. It is rather in the implications inherent in the Court's elucidation of the true grounds upon which many of the Court's decisions which seemed to involve the discarded doctrine actually rested. In the instant case the Commission erroneously contended in the court below (Brief, p. 14) that the regulations "clearly fall into the group of cases" referred to by this Court in the first category described in the opinion where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action" (307 U. S., p. 130). This Court said (p. 131) that denial of judicial review in these cases rests either upon an absence of the constitutional requirement of a "case" or "controversy" or upon the "procedural philosophy" whereby "Congress has been loath to

authorize review of *interim steps* in a proceeding." But we have already shown that the present order was in no sense an "interim step", and that there is unquestionably a "case" or "controversy". We have also shown that the order adversely affects Columbia now.

Each of the cases referred to by this Court in its opinion in the *Rochester* case (307 U. S., p. 130) as examples of cases under the Urgent Deficiencies Act involving orders which are not reviewable because the complainant's rights are adversely affected only "on the contingency of future administrative action" is distinguishable from the present case.

United States v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299, involved a determination by the Interstate Commerce Commission of the "final value" of the railroad's property under the Valuation Act. This Court pointed out: (1) (p. 309) that the orders which had previously been held subject to review had been "an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and *rule making*"; (2) (pp. 309-310) that the "so-called order" did not "determine any right or obligation"; and (3) (p. 310) that it was "merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission", and "is the exercise solely of the function of investigation." The order in the present case, on the other hand, purports to be made under the Commission's rule-making power, and is formal action which destroys rights and property.

Shannahan v. *United States*, 303 U. S. 596, involved merely a finding of the Interstate Commerce Commission to the effect that a railway was not "a street, interurban or suburban electric railway" within the meaning of the exemption provided by Section 1 of the Railway Labor Act. No

order was entered by the Commission on the finding. This Court said (p. 599):

> "The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative.'"

Obviously this could not be said about the order in the present case. This Court further pointed out (pp. 599, 600) that the determination was not enforceable by the Commission and was not even enforceable by the National Mediation Board by which it was sought; and that the determination did not command or direct anything to be done. The order in the present case, however, is self-executing in its interference with valid contractual relations, and is one which, if valid, is enforceable and will be enforced by the Commission itself.

Delaware & Hudson Co. v. *United States,* 266 U. S. 438, involved a determination by the Interstate Commerce Commission of a "tentative valuation" of the railroad's property. Section 19a of the Interstate Commerce Act provided that upon "notice of protest" by the railroad of the "tentative valuation" the Commission should hold a hearing thereon and "make such changes as may be necessary" before issuing a final valuation. The railroad had filed a notice of protest but commenced its suit under the Urgent Deficiencies Act before the Commission had acted thereon. Thus the determination complained of did not constitute the final determination of the proceeding before the Commission. Here the order complained of was legislative in character and terminated the investigation which preceded it.

United States v. *Illinois Cent. R. R. Co.,* 244 U. S. 82, is sufficiently distinguished by the following language in this Court's opinion (p. 89):

"* * * And again, as other counsel say, the alleged order was nothing more than notice of a hearing which the railroad company might attend or not, as it saw fit.

The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing."

CONCLUSION.

The decision of the District Court should be reversed and the cause remanded with directions to the District Court to hear and determine the motion for preliminary injunction, and otherwise proceed with this cause on the merits.

Respectfully submitted,

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APPENDIX

Section 402 of Communications Act of 1934 (47 U. S. C., Sec. 402):

(a) The provisions of the Act of October 22, 1913, ch. 32, 38 Stat. 219, relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commis-

sion. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested persons may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and

in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of Title 28, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.